

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ITV DIRECT, INC.,)	
Plaintiff,)	
)	
)	
v.)	CIVIL ACTION NO. 04-CV-10421-JLT
HEALTHY SOLUTIONS, LLC, et al.,)	
Defendants.)	
)	
RELATED CASES)	
)	

**PLAINTIFF'S SURREPLY TO DEFENDANTS' REPLY IN SUPPORT OF
ITS MOTION FOR TEMPORARY RESTRAINING ORDER**

Plaintiff, ITV Direct, Inc. (“ITV” or “Plaintiff”), submits this surreply to the Reply in Support of Defendants’ Motion for Temporary Restraining Order filed by defendants, Healthy Solutions, LLC (d/b/a Direct Business Concepts) (“Healthy Solutions”), Health Solutions, Inc. (“HS”), and Alejandro Guerrero (“Guerrero”) (collectively, the “Defendants”). The Defendants’ Reply confirms what is set forth in the Plaintiff’s Opposition, that Defendant Guerrero is not a doctor, and the Defendants have committed fraud on ITV and are before this Court with unclean hands. The Defendants have failed to offer any credible evidence to show that they are entitled to the drastic relief that they seek, and their motion must be denied.

ARGUMENT

The Defendants’ Reply confirms that the Defendants made false representations to ITV and in promotional materials about Guerrero’s status as a doctor and about the scientific support for the health claims Guerrero made about Supreme Greens with MSM (the “Product”), in order to induce ITV into entering into the Distribution Agreement at issue. The Defendants cannot dispute that they fraudulently represented to ITV that Guerrero is a doctor and OMD, that he operates a clinic in California, where he has cancer patients, AIDS patients, and patients with

MS, diabetes and Parkinson's disease, and that he conducted a clinical study of over 200 of patients through his clinic to support their claims regarding the health benefits of the Product. (Maihos Aff., ¶3; Affidavit of Donald Barrett ("Barrett Affidavit") ¶ 3, attached hereto as Exhibit A.) The Defendants also cannot dispute that Guerrero made these claims in promotional materials and in the infomercial for the Product, where he confirmed these facts. (Maihos Aff., ¶3; Barrett Aff., ¶¶ 6, 10.) These representations now appear to be false, as confirmed by the absence of any contrary facts in the Defendants' Reply.

Despite the fact that the Defendants originally continued their ruse in connection with this motion, by claiming again that Guerrero is a doctor and an O.M.D. and that his professional reputation will be irreparably harmed by the Plaintiff's conduct, they completely ignore this issue in their Reply.¹ Instead, the Defendants first make the ridiculous assertion that Guerrero, an officer of Healthy Solutions and allegedly "renowned" creator of the Product, was merely a "spokesperson" for the infomercial, and was not responsible for the representations and warranties in the Distribution Agreement. Secondly, the Defendants falsely claim that they had no ability to review or approve the Supreme Greens infomercials, and that ITV exercised total control over the editing of such infomercials. (Reply, p. 5.) There is absolutely no merit to either of these assertions.

As set forth in the Affidavit of Donald Barrett, the principal shareholder of ITV, the infomercial filming for the Product was unscripted, and ITV did not dictate any of the statements made by Guerrero, including his statements regarding his credentials as a doctor and O.M.D., his extensive clinical practice, or the clinical studies and scientific support for the Product. (Barrett

¹ Tellingly, in his most recent affidavit dated May 13, 2004, Guerrero does not assert that he is a doctor or an O.M.D., although the CEO of Healthy Solutions, defendant Geremesz, asserted in his affidavit filed in support of this motion that "Dr. Guerrero" developed the Supreme Greens product "based on his years of practice as an O.M.D." (Affidavit of Gregory Geremesz ("Geremesz Aff."), dated April 6, 2004, ¶ 5.)

Aff., ¶¶5 - 6.) Guerrero confirmed to ITV that he possessed documentary and clinical support for each and every representation he made in the infomercial. (*Id.*, ¶6.) A review of the unedited infomercial belies the Defendants' argument that Guerrero's statements were not made by his own volition. Guerrero voluntarily made each and every statement in the infomercial, was provided with a copy of the edited tape, reviewed the tape and approved each and every statement that he voluntarily made. (*Id.*, ¶11.) In fact, Guerrero complemented the edited version of the infomercial. (*Id.*) The tape was also reviewed by Defendant Geremesz, with no objections. (*Id.*) The Defendants seem to suggest that ITV somehow should have discovered that their representations were false because it edited the infomercial. As the testimony of Donald Barrett makes clear, this contention is absurd.

Defendant Guerrero also claims that the web pages that were attached as exhibits to ITV's Opposition, in which Guerrero held himself out as a doctor, were not under his control. However, Health Solutions' own web site, which is entirely under Defendants' control, has an entire page dedicated to "Dr." Guerrero and his credentials and experience, including his post-graduate degree in Traditional Chinese Medicine. (See copy of Health Solutions web page featuring Dr. Guerrero, attached as Ex. 1 to the affidavit of Christopher F. Robertson, Esq., attached hereto as Exhibit B.) By fraudulently representing on numerous occasions that Guerrero was a doctor and an O.M.D., the Defendants not only harmed the Plaintiff by inducing it into entering the Distribution Agreement, but Guerrero also violated California criminal statutes and regulations.² The Defendants cannot come before this Court seeking equity when

² Any person who holds himself out as a doctor, or as someone who practices any treatment of the sick or afflicted, or who diagnoses or prescribes for any ailment, injury or other physical or mental condition, without the proper physician's and surgeon's certificate in California has committed a misdemeanor. See CA Business and Professions Code Section 2050 – 2502(a), attached to the Robertson Aff. at Ex. 2. Moreover, Guerrero may not use the initials O.M.D., as Defendants have represented him to be in this Court and in promotional material, as he is not licensed as a physician and surgeon under the CA Medical Practice Act, nor is he a licensed acupuncturist with a Doctorate

they are “tainted with inequitableness or bad faith relative to the matter in which [they] seeks relief,” and the Court must deny their motion based on their unclean hands. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 910-12 (1st Cir. 1989).

The Defendants also failed to dispute that as a result of their false statements and fraud, the FDA and the Federal Trade Commission (FTC) are investigating the health claims that Guerrero has made in connection with the Product. (Maihos Aff., ¶10.) Based on the Defendants’ conduct, ITV could be subject to substantial legal exposure, for which the Defendants must defend and indemnify ITV under the terms of the Distribution Agreement. Due to the fact that the damages that ITV will suffer as a result of the Defendants’ fraud, breach of contract, and indemnification will likely far exceed the amounts that the Defendants are seeking to attach by this motion, the Defendants clearly are not entitled to any type of injunctive relief.³ Since the “likelihood of success is the sine qua non of preliminary injunctive relief,” the Court should deny the Defendants’ motion without further analysis. *McGuire v. Reilly*, 260 F.3d 36, 42 (1st Cir. 2001), *citing Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993).

Furthermore, because the Defendants have absolutely no evidence that ITV was infringing the Product’s trademark with “non-genuine” product, the Defendants now assert that they have “new evidence” that they are about to suffer immediate and irreparable injury. This evidence is based on the claim that a Supreme Greens infomercial was aired on seven occasions between April 19, 2004 and April 28, 2004, and that one of ITV’s officers, Robert Maihos,

Degree in Oriental Medicine. (See Attorney General of the State of California, Opinion No. 87-103 (March 3, 1988), attached to the Robertson Aff. at Exhibit 3; and relevant sections of the Standards of Practice of the California Acupuncture Board, attached to the Robertson Aff. at Exhibit 4.)

³ Defendants attempt to argue that the Plaintiff is not entitled to a set-off under the U.C.C. However, because the Defendants are contractually obligated to defend and indemnify the Plaintiff, the Defendants argument is misplaced and entirely inapposite.

committed perjury in his April 9, 2004 affidavit when he stated that ITV had no intention of airing the infomercial in the future. This assertion is entirely baseless and is merely an attempt to taint ITV's reputation before this Court, as well as direct the Court's attention away from the central issue of the Defendants' fraud.⁴ Consistent with Maihos' affidavit, ITV has not purchased any media time for the Supreme Greens with MSM product in over a month, and has no intention to purchase any additional media for this product in the future. (Barrett Aff., ¶ 15.) Although the Defendants claim there were a few isolated airings of the infomercial in late April, this is the result of previously purchased media that ITV was either unable to cancel or was technically unable to replace with substitute programming.⁵ (*Id.*) This clearly does not meet the Defendants' burden that it will suffer immediate and irreparable harm and their motion for injunctive relief must be denied.

⁴ Tellingly, Guerrero never explains in his most recent affidavit the identity of the "agents" of ITV who allegedly told him four times that ITV had produced fake Supreme Greens product. He also fails to explain or address the large discrepancy in the affidavits he filed in the California action before it was transferred to this Court, where he stated that Robert Maihos told him that ITV was producing a fake product. Once Maihos denied this baseless assertion in his own affidavit, (Maihos Aff., ¶¶ 17-20), Guerrero then changed his story and claimed that he learned this information from an intermediary, Todd Stanwood. Although Stanwood filed an affidavit vehemently denying this assertion, Guerrero completely ignores this discrepancy in his recent affidavit. (Stanwood Aff., ¶ 3.)

⁵ Moreover, as set forth clearly in ITV's Opposition, there is no "non-genuine" product, and ITV has no current plans to produce any greens product, and, most importantly, if such a product is ultimately produced for marketing, it will not be sold under the "SUPREME GREENS" mark until a court has decided the issue of ownership of that mark. ((Maihos Aff., ¶¶ 14-16, ¶ 19.)

Dated: May 19, 2004

Respectfully submitted,
ITV DIRECT, INC.
By their attorney(s),

/s/ Peter S. Brooks

Peter S. Brooks, BBO #058980
Christopher F. Robertson, BBO #642094
Susan W. Gelwick, BBO #567115
SEYFARTH SHAW LLP
Two Seaport Lane, Suite 300
Boston, MA 02210-2028
Telephone: (617) 946-4800
Telecopier: (617) 946-4801